

No. 16119 ✓

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
corporation and D. W. CLARK, Appellants,

vs.

MURRAY D. AGATE, Trustee in Bankruptcy of
the Estates of Alton C. Simmons, Cecelia Mae
Simmons, Alvin L. Simmons, Oda Jane Sim-
mons and Lawrence W. Simmons, individually
and as co-partners dba Alpine Lodge, bank-
rupts, Appellee.

Transcript of Record

Appeals from the United States District Court
for the District of Oregon

FILED

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PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

Civil No. 8724

MURRAY D. AGATE, Trustee in Bankruptcy of
the Estates of ALTON C. SIMMONS, CECE-
LIA MAE SIMMONS, ALVIN L. SIM-
MONS, ODA JANE SIMMONS and LAW-
RENCE W. SIMMONS, individually and
as co-partners, dba ALPINE LODGE,
Plaintiffs,

vs.

D. W. CLARK and UNION OIL COMPANY OF
CALIFORNIA, a corporation, Defendant.

MEMORANDUM

East—Judge.

This matter came on for hearing upon the request of counsel for all the parties for a determination of a jurisdictional question presented upon certain agreed facts, as follows:

“Voluntary petitions in bankruptcy were filed as to Alton C. Simmons, Cecelia Mae Simmons, Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons early in August, 1954, and adjudications in bankruptcy were entered as to these petitioners on August 9 and August 10, 1954. The alleged preference occurred on a date which, for the purposes of this inquiry, we will assume to be May 1, 1954, which is within four months from the date of filing

the petitions in bankruptcy of the individuals above named. The alleged preference consisted of the payment of money which was a partnership asset of Alpine Lodge, a co-partnership consisting of some or all of the above-named individuals. A voluntary petition for the adjudication in bankruptcy of Alpine Lodge, a co-partnership, was filed on March 25, 1955, and based thereon said partnership was adjudicated a bankrupt on March 28, 1955."

Counsel has stated the question involved under the foregoing agreed facts as being whether the alleged preference occurred within four months before the filing of the petition in bankruptcy of the transferor, bankrupt, Alpine Lodge, a co-partnership, as required by Sec. 60 of the Bankruptcy Act, Title 11, U.S.C.A. Sec. 96.

It is apparent from the agreed facts that more than four months did expire between the date of the alleged preference and the filing of a petition in bankruptcy by the mentioned co-partnership. The legal question presented is better stated as whether or not the alleged preference occurred within four months before the co-partnership was in fact and in law adjudged a bankrupt.

This opinion does not deal with the question as to whether or not the alleged transfer was a preference within the meaning of the Bankruptcy Act and that question is reserved.

The question is answered by reaching a determination of the full effect of the 1938 amendment of Sec. 5(i) of the Bankruptcy Act of 1898. It is ap-

parent that prior to the amendment of 1938 the so-called "entity doctrine" of a co-partnership was followed and thereby made a distinction from the entity of the individual co-partners.

Following the 1938 amendment, Sec. 5(i) of the Bankruptcy Act provided:

"Where all the general partners are adjudged bankrupt, the partnership shall also be adjudged bankrupt."

Collier, in his work — 1 Collier on Bankruptcy, 741, Sec. 5.36, says, in substance, that pre-1938 cases interpreting the Act in the light of the co-partnership entity doctrine held that the partnership was not to be adjudged bankrupt except upon its petition even though all the general partners had been adjudicated, and concludes that that authority was no longer controlling in view of Sec. 5(i), *supra*.

Without further belaboring the matter, Collier, in his work, again, in Vol. 1, commencing on page 685, concludes:

"Where all the general partners are individually adjudicated, the partnership entity itself, without further petition, is also adjudicated bankrupt."

To hold otherwise would do violence to the plain and clear wording of Sec. 5(i), *supra*.

The Court further concludes that the fact that the Trustee in Bankruptcy for the individuals did later file a petition on behalf of the co-partnership

in nowise changed the adjudication of the co-partnership as a bankrupt as of the final adjudication of all the co-partners. It appearing conclusively that four months had not elapsed after the date of the alleged preference and before the adjudication of all the co-partners as bankrupts, therefore, the question is answered in the affirmative that the alleged preference was made within four months before the adjudication of the co-partnership as a bankrupt.

Counsel for the plaintiff is requested to submit appropriate order.

Dated, November 20th, 1956.

[Endorsed]: Filed November 28, 1956.

[Title of District Court and Cause.]

ORDER

The parties having submitted to the court for a determination based upon the files and records in this case and the files and records in the cases of the bankrupts above named the question of the date of the filing of petitions initiating a proceeding under the Bankruptcy Act within the meaning of Section 60 of said act. It appeared to the court that Alton C. Simmons and Cecelia Mae Simmons filed voluntary petitions in bankruptcy in this court on August 9, 1954 and Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons filed voluntary petitions in bankruptcy in this court on August

10, 1954 and said bankrupts were adjudicated upon the dates of the filing of their petitions. Said bankrupts included all of the general partners of a co-partnership, doing business under the name of Alpine Lodge. Between March 1, 1954 and May 31, 1954 said partnership transferred certain assets to defendants herein and the plaintiff as trustee in bankruptcy of the estates of said bankrupts has attacked said transfers as preferential transfers within the meaning of Section 60 of the Bankruptcy Act. The partnership was not adjudicated a bankrupt until March 28, 1955 upon a petition filed by plaintiff as trustee on March 25, 1955. Plaintiff contends that the dates of the filing of petitions initiating proceedings under the Bankruptcy Act are August 9, 1954 and August 10, 1954 and defendants contend that said date is March 25, 1955. Counsel for the parties having submitted several written memorandums and the court being fully advised finds that the dates of the filing of petitions initiating proceedings under the Bankruptcy Act in this case are August 9 and 10, 1954.

It Is Therefore Ordered that the parties shall forthwith submit a pre-trial order herein, which said order shall recite that the court has determined that the dates of the filing of petitions initiating proceedings against the partnership herein under the Bankruptcy Act is the date that all general partners had filed their petitions seeking adjudication as bankrupts.

Done at Portland, Oregon, this 5th day of December, 1956.

/s/ WILLIAM G. EAST,
Judge.

Acknowledgment of Service and Certificate of Mailing Attached.

[Endorsed]: Filed December 5, 1956.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on regularly for pre-trial conference before the Honorable William G. East on October 29, 1956. Plaintiff was represented by Herbert H. Anderson, one of his attorneys and defendants were represented by David R. Williams of their attorneys.

During the course of the pre-trial conference the facts were agreed upon by the parties, contentions of the parties were stated, exhibits were identified and issues were framed as follows:

Agreed Facts

I.

Plaintiff is the Trustee in Bankruptcy of the following bankrupt estates:

Alton Clifton Simmons — Bankruptcy No.
B-35379

Cecelia Mae Simmons — Bankruptcy No.
B-35380

Alvin Lawrence Simmons — Bankruptcy No.
B-35392

Oda Jane Simmons — Bankruptcy No.
B-35393

Lawrence White Simmons—Bankruptcy No.
B-35394

Alpine Lodge, a co-partnership, consisting of
some or all of the individuals above named—
Bankruptcy No. B-35379

Plaintiff brings this action under Section 60 of the
Act of Congress relating to bankruptcy.

II.

Between the dates of March 3, 1954 and May 31,
1954, Alton Simmons, Alvin Simmons, and Law-
rence W. Simmons, acting as co-partners in the
firm of Alpine Lodge or Alpine Lodge and Coffee
Shop, transferred certain partnership assets of said
firm to D. W. Clark.

III.

As a result of said transfers, the following part-
nership assets were received by these defendants:

(a) Defendant Union Oil Company of Califor-
nia, received the sum of \$2,271.15.

(b) Defendant D. W. Clark received an account
receivable from C. E. Grooms in the amount of
\$229.91, and an account receivable from Oregon
Film Service in the amount of \$442.24, and the sum
of \$228.85.

IV.

That at the time of said transfers, defendants
were creditors of the transferor, Alpine Lodge or

Alpine Lodge and Coffee Shop, a co-partnership, consisting of some or all of the above-named individual bankrupts. That the amount of \$2,271.15 was received by defendant Union Oil Company of California on account of an antecedent indebtedness, and the accounts receivable from C. E. Grooms in the amount of \$229.91 and from Oregon Film Service in the amount of \$422.24 were received by defendant D. W. Clark on account of an antecedent indebtedness.

V.

On August 9, 1954, Alton C. Simmons and Ceceilia Mae Simmons as individuals filed voluntary petitions in bankruptcy in this court and were adjudged bankrupts on said date. On August 10, 1954, Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons as individuals filed voluntary petitions in bankruptcy in this court and were adjudged bankrupts on said date. Said bankrupts included all of the general partners of the partnership known as Alpine Lodge.

VI.

On or about March 28, 1955, Alpine Lodge, a co-partnership was adjudged a bankrupt.

VII.

On March 25, 1955 plaintiff Murray D. Agate as Trustee in Bankruptcy of the estates of the five individual bankrupts above-named filed with Referee Lester G. Oehler the petition which is Exhibit 1.

VIII.

On April 13, 1955 the five bankrupts here involved acting as co-partners filed the petition which is Exhibit 2.

Plaintiff's Contentions

I.

Said transfers by the bankrupt partnership on May 1, 1954 were transfers of their property to or for the benefit of defendants for or on account of antecedent debts and were made or suffered by such debtors while insolvent and within four months before the filing by or against them of the petitions initiating a proceeding under the Bankruptcy Act and the effect of said transfers will be to enable such creditors to obtain a greater percentage of their debts than some other creditors of the same class.

II.

At the time said transfers were made on May 1, 1954 the bankrupts making said transfers were insolvent and the defendants or their agents acting with reference thereto then had reasonable cause to believe that the said bankrupts were insolvent.

III.

Said transfers to defendants on May 1, 1954 constituted voidable preferences and should be set aside pursuant to Section 60 of the Act of Congress relating to bankruptcy.

IV.

Plaintiff should have judgment against defendant

D. W. Clark for the sum of \$881 and against defendant Union Oil Company of California for the sum of \$2,271.15 and against both defendants for his costs and disbursements herein incurred.

V.

The following additional preferential transfers were made by the bankrupts to defendant Union Oil Company of California and should be avoided:

On April 14, 1954.....	\$221.08
On April 25, 1954.....	10.00
On April 26, 1954.....	300.36
On May 11, 1954.....	320.32

and other miscellaneous transfers.

VI.

Plaintiff is entitled to interest from November 3, 1954, the date of the trustee's demand herein.

VII.

Certain additional preferential transfers were made by the bankrupts to defendant D. W. Clark.

Contentions of Defendant, Union Oil Company of California

I.

Denies all of plaintiff's contentions.

II.

This action cannot be maintained because the allegedly preferential transfer occurred more than

four months prior to the petition in bankruptcy of the transferor-bankrupt, Alpine Lodge, a co-partnership, which date was March 25, 1955 or April 13, 1955.

Contentions of Defendant, D. W. Clark

I.

Denies all of plaintiff's contentions.

II.

This action cannot be maintained because the allegedly preferential transfer occurred more than four months prior to the petition in bankruptcy of the transferor-bankrupt, Alpine Lodge, a co-partnership, which date was March 25, 1955 or April 13, 1955.

III.

The payment of Two Hundred Twenty-eight and 85/100 (\$228.85) Dollars received by this defendant was not a preference because it did not diminish the estate of the transferor-bankrupt, Alpine Lodge, a co-partnership. Said payment was a portion of insurance proceeds received by the transferor-bankrupt on behalf of consigned goods owned by this defendant which were destroyed by fire. Pursuant to the consignment agreement between the transferor-bankrupt and this defendant, said payment was the property of this defendant and not the property of the transferor-bankrupt.

Issues of Law

1. What was the date of the filing by or against

the bankrupt Alpine Lodge, a co-partnership, of the petitions initiating proceedings under this Act within the meaning of Section 60 of the Bankruptcy Act.

2. Should all or any part of said transfers be set aside as preferential transfers under Section 60 of the Act of Congress relating to bankruptcy?

Issues of Fact

1. At the time of said transfers, was the transferor, Alpine Lodge, a co-partnership, insolvent?

2. At the time of said transfers, did the defendants or their agents acting with reference thereto then have reasonable cause to believe that the said bankrupts were insolvent?

3. Did the transfers have the effect of diminishing the estate of the bankrupt transferor, Alpine Lodge, a co-partnership?

4. Did the transfers enable the creditor-transferees to obtain a greater percentage of their debts than other creditors of the same class?

5. Was the payment of \$228.85 received by defendant D. W. Clark pursuant to a consignment agreement whereby, in the event that said defendant's goods consigned to the transferor-bankrupt were destroyed by fire, said defendant became the owner of the proceeds of bankrupt's fire insurance applicable to said goods?

Exhibits

1. Trustee's petition filed March 25, 1955.

2. Partnership petition filed April 13, 1955.
3. Books and records of the bankrupts.
- 3-B. Check book.
- 3-C.
- 3-D. Bill of sale.
4. Records of the Clerk.
5. Records of the Referee.
6. Business records of defendant Union Oil Company of California.
7. Business records of defendant D. W. Clark.
8. Assignment of L. W. Simmons, Alton C. Simmons and Alvin L. Simmons dated April 27, 1954.
9. Bankrupts records.
10. Schedule in Bankruptcy—Mr. Simmons.
11. Schedule in Bankruptcy—Mrs. Simmons.
12.
13. Union Oil Co. statement.
14. Records of Logan.
15. Letter to Traveler's.
16. Statement.
17. Letter.
18. Letter.
20. Request for admmiss.
21. Ans. Union Oil.
22. Ans. Clark.
23. Assignment.
24. A, B, C & D—Credit Reports.
25. C——
26. Statement.
27. Consignment receipts.
28. Invoices of goods destroyed.

30. A, B & C.

The parties having agreed upon the foregoing pre-trial order and having stipulated that it shall replace the pleadings herein, and shall not be amended except to prevent manifest injustice, it is hereby signed and entered this 18th day of December, 1956.

/s/ WILLIAM G. EAST,
Judge.

KOERNER, YOUNG, McCOLLOCH,
AND DEZENDORF,
/s/ HERBERT H. ANDERSON,
Attorneys for Plaintiff.

/s/ DAVID R. WILLIAMS,
Attorney for Defendants.

/s/ ARTHUR A. WILSON,
Attorney for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 18, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on regularly for trial before the undersigned judge of the above entitled court on December 18, 1956 and said trial continued on February 11, 1957. Plaintiff appeared in person and by his attorney Herbert H. Anderson. Defendant D. W. Clark appeared in person and by his attorney

Arthur A. Wilson. Defendant Union Oil Company of California appeared by David R. Williams, its attorney. Evidence was produced by each party, argument was made by counsel and subsequently memorandums of law were filed on behalf of each party. The court now being fully advised hereby makes and enters the following:

Findings of Fact

1. Plaintiff is the trustee in bankruptcy of the following bankrupt estates: Alton Clifton Simmons, Bankruptcy No. B-35379; Cecelia Mae Simmons, Bankruptcy No. B-35380; Alvin Lawrence Simmons, Bankruptcy No. B-35392; Oda Jane Simmons, Bankruptcy No. B-35393; Lawrence White Simmons, Bankruptcy No. B-35394; and Alpine Lodge, a co-partnership consisting of all of the above named individuals, Bankruptcy No. B-35379.

2. Plaintiff brings this action under Section 60 of the Act of Congress relating to bankruptcy.

3. In the months of April and May, 1954, Alton Clifton Simmons, Cecelia Mae Simmons, Alvin Lawrence Simmons, Oda Jane Simmons and Lawrence White Simmons were co-partners, doing business as Alpine Lodge.

4. On May 3, 1954 said partnership transferred to defendant D. W. Clark an account receivable from C. E. Grooms of the value of \$229.91 on account of an antecedent indebtedness of said partnership, which property has been converted by defendant D. W. Clark.

5. On May 3, 1954 said partnership transferred to defendant D. W. Clark an account receivable from Oregon Film Service of the value of \$422.24 on account of an antecedent indebtedness of said partnership, which property has been converted by defendant D. W. Clark.

6. On May 20, 1954 said partnership transferred to defendant D. W. Clark the sum of \$228.85 on account of an antecedent indebtedness of said partnership.

7. On May 20, 1954 said partnership transferred to defendant Union Oil Company of California the sum of \$2,271.15 on account of an antecedent indebtedness of said partnership.

8. There was no agreement by and between defendant D. W. Clark and any of the bankrupts that they would insure for his benefit any of the merchandise consigned by defendant D. W. Clark to said bankrupts.

9. Said partnership was insolvent from and after the fire which destroyed the bankrupt's service station on March 2, 1954 and at all times between May 3, 1954 and August 10, 1954 the property of said partnership was not at a fair valuation sufficient in amount to pay its debts, the property of the individual members of said partnership, after payment of their individual debts, was not at a fair valuation sufficient to make up the deficiency on the firm debts, and said partnership was insolvent within the meaning of the Bankruptcy Act.

10. Defendant D. W. Clark and defendant Union Oil Company of California, or his or its agents acting with reference thereto, had, at the time when said transfers were made, reasonable cause to believe that the assets of said partnership were insufficient to pay its debts, that the assets of the individual members of said partnership, after payment of their individual debts, were insufficient to make up the deficiency on the partnership debts, that the assets of the individual bankrupts were insufficient to pay their individual debts and that both said individual bankrupts and said partnership were insolvent within the meaning of the Bankruptcy Act.

11. At the time said transfers were made said partnership had other creditors of the same class as defendant D. W. Clark and defendant Union Oil Company of California, at the time of said transfers no payment was made to said other creditors of the same class as defendants and the effect of said transfers was to enable defendants to obtain a greater percentage of their debts than some other creditor of the same class.

12. On August 9, 1954 Alton Clifton Simmons and Cecelia Mae Simmons filed voluntary petitions in this court requesting adjudication as bankrupts and on the same day they were adjudicated bankrupts in proceedings Nos. B-35379 and B-35380 respectively.

13. On August 10, 1954, Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons filed

voluntary petitions in this court seeking adjudication as bankrupts and on the same day they were adjudicated bankrupts in proceedings Nos. B-35392, B-35393 and B-35394.

14. Said Alton C. Simmons, Cecelia Mae Simmons, Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons constituted all of the partners of said partnership known as Alpine Lodge.

15. On March 25, 1955 plaintiff filed herein a request that said partnership be adjudicated bankrupt pursuant to Section 5 (i) of the Bankruptcy Act since all of the general partners of said partnership had been adjudged bankrupts.

16. On March 31, 1955 said partnership was adjudged bankrupt pursuant to Section 5 (i) of the Bankruptcy Act.

17. All of said transfers were made from property of said partnership.

18. At the time of said transfers defendant D. W. Clark and defendant Union Oil Company of California were creditors of said partnership.

19. Each of said transfers diminished the estate of the transferor.

20. On April 27, 1954 L. W. Simmons, Alton C. Simmons and Alvin L. Simmons, sent the following letter to the Travelers Insurance Company:

“This will be your authority to pay to D. W. Clark of Riddle, Oregon, the sum of Two Thousand Five Hundred Dollars (\$2,500.00) due and

payable to the undersigned as settlement from your insurance company in settlement of a fire loss at the Alpine Lodge.”

Said letter was received by the Travelers Insurance Company in Portland, Oregon, on April 29, 1954. The Travelers Insurance Company did not pay said sum of \$2,500.00 to D. W. Clark, but instead, on May 19, 1954, drew its check in favor of the bankrupts L. W. Simmons, Alton C. Simmons and Alvin L. Simmons. Said check was mailed to the bankrupts' insurance agent at Riddle, Oregon, and on May 20, 1954, was endorsed by said bankrupts, who then caused delivery of said endorsed check to D. W. Clark on May 20, 1954, for the benefit of D. W. Clark in the amount of \$228.85 and for the benefit of Union Oil Company of California in the amount of \$2,271.15.

21. Said letter of April 27, 1954, sent to the Travelers Insurance Company by said bankrupts was not an assignment; The Travelers Insurance Company was not required to, and did not, pay said funds to D. W. Clark, and the authority contained in said letter to pay said sum to D. W. Clark could have been revoked by said bankrupts at any time.

22. The Travelers Insurance Company held said sum of \$2,500.00 subject to said bankrupts' order until it drew a check in favor of said bankrupts on May 19, 1954, and said sum was not effectively transferred to D. W. Clark until said bankrupts endorsed said check and delivered it to D. W. Clark on May 20, 1954.

ings of fact and conclusions of law herein and the court being fully advised,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff shall have and recover judgment against defendant D. W. Clark for the sum of \$974.70.

It Is Further Ordered, Adjudged and Decreed that plaintiff shall have and recover judgment against defendant Union Oil Company of California in the amount of \$2,511.54.

It Is Further Ordered that plaintiff shall have and recover judgment against defendants D. W. Clark and Union Oil Company of California for his costs and disbursements herein incurred.

May 9, 1958.

/s/ WILLIAM G. EAST,
Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 9, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL AND ALLOWANCE
OF APPEAL

Notice is hereby given that Union Oil Company of California, a corporation, one of the defendants above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered herein on or about the 24th day of April, 1958, and from the Amended Judgment entered herein on the 9th day of May, 1958.

Dated this 23rd day of May, 1958.

WILLIAMS & ALLEY,
/s/ DAVID R. WILLIAMS,
Of Attorneys for Defendant Union
Oil Company of California.

The foregoing Appeal hereby is allowed.

Dated this 23rd day of May, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed May 23, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellant-Defendant, Union Oil Company of California, submits the following Statement of Points upon which it intends to rely in the within Appeal:

1. The District Court erred in holding that the alleged transfers occurred within four months of the Petition initiating bankruptcy proceedings as to the Transferor-Bankrupt, Alpine Lodge, a co-partnership.

Respectfully submitted this 23rd day of May, 1958.

WILLIAMS & ALLEY,
/s/ DAVID R. WILLIAMS,

Of Attorneys for Defendant Union
Oil Company of California.

Acknowledgment of Service and Certificate of
Service by Mail Attached.

[Endorsed]: Filed May 23, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that D. W. Clark, one of the defendants above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered herein on or about the 24th day of April, 1958, and from the amended judgment entered herein on the 9th day of May, 1958.

This defendant-appellant, D. W. Clark, hereby joins in the appeal heretofore filed herein by Union Oil Company of California, a corporation, defendant-appellant.

Dated this 26th day of May, 1958.

WILLIAMS & ALLEY,
/s/ DAVID R. WILLIAMS,
Of Attorneys for D. W. Clark,
Defendant-Appellant.

[Endorsed]: Filed May 26, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL
AND STATEMENT OF POINTS ON
APPEAL

Defendant-Appellant D. W. Clark hereby adopts as his designation of record on appeal that certain Designation of Record on Appeal filed herein by Defendant-Appellant Union Oil Company of California, a corporation, on or about the 23rd day of May, 1958.

Defendant-Appellant D. W. Clark hereby adopts as his statement of points upon which he intends to rely in the within appeal that certain Statement of Points on Appeal previously filed herein by Defendant-Appellant Union Oil Company of California, a corporation, on or about the 23rd day of May, 1958.

Done and Dated this 26th day of May, 1958.

WILLIAMS & ALLEY,
/s/ DAVID R. WILLIAMS,
Of Attorneys for Defendant-
Appellant D. W. Clark.

Acknowledgment of Service and Certificate of Service by Mail Attached.

[Endorsed]: Filed May 26, 1958.

[Title of District Court and Cause.]

APPELLANTS' AMENDED DESIGNATION OF RECORD ON APPEAL

Come now Defendants-Appellants Union Oil Company of California, a corporation, and D. W. Clark, and hereby designate for inclusion in the Record and Transcript on Appeal to the United States Court of Appeals for the Ninth Circuit the following which supersedes the Designation of Record on Appeal heretofore filed by these defendant-appellants:

1. Pretrial Order.
2. Memorandum Opinion dated November 20, 1956.
3. Order dated December 5, 1956.
4. Findings of Fact and Conclusions of Law.
5. Amended Judgment entered May 9, 1958.
6. The following portions of Exhibit No. 5 (Records of the Referee):

a. Petition (excluding Schedules) of Alton Clifton Simmons, Cecelia Mae Simmons, Lawrence W. Simmons, Oda Jane Simmons, and Alvin L. Simmons dated April 8, 1955, bearing filing stamp of Lester G. Oehler, Referee in Bankruptcy, dated April 12, 1955.

b. Copy of letter dated March 30, 1955, by Referee in Bankruptcy addressed to F. L. Buck, Acting Clerk, United States District Court.

c. The Order for Payment of Fees dated March 31, 1955, which bears filing stamp of F. L. Buck, Acting Clerk, by E. W. Davis, Deputy, dated March

31, 1955, and filing stamp of Lester G. Oehler, Referee in Bankruptcy, dated April 1, 1955.

7. Notice of Appeal of Defendant Union Oil Company of California.

8. Notice of Appeal of Defendant D. W. Clark.

9. Statement of Points on Appeal of Defendant Union Oil Company of California.

10. Designation of Record on Appeal and Statement of Points on Appeal of Defendant D. W. Clark.

11. This Amended Designation of Record on Appeal.

Done and Dated This 22nd day of July, 1958.

/s/ DAVID R. WILLIAMS,

Of Attorneys for Defendants-Appellants Union Oil Company of California and D. W. Clark.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 22, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Memorandum of Judge William G. East; Order to submit pre-trial order; Pre-trial order; Findings of fact and conclusions of law; Judgment; Amended judg-

ment; Notice of appeal of Union Oil Company of California; Undertaking for costs on appeal and supersedeas bond; Statement of points on appeal; Notice of appeal of D. W. Clark; Designation of record on appeal and statement of points on appeal; Undertaking for costs on appeal and supersedeas bond; Motion for extension of time for docketing appeal; Order extending time for filing record on appeal and docketing appeal; Appellants' amended designation of record on appeal; Stipulation re forwarding exhibits to Court of Appeals; Order to forward exhibits to Court of Appeals; Amended designation by appellee of additional portions of record; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8724, in which D. W. Clark and Union Oil Company of California are the defendants and appellants and Murray D. Agate, Trustee in Bankruptcy, etc., is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellants and appellee, and in accordance with the rules of this court.

I further certify that there are being forwarded under separate cover exhibits 5; 10; 11; 12; 31 and 32, also photostat copies of petition and adjudication of bankruptcy, dated March 28, 1955 and photostat copies of Orders of adjudication of bankruptcy, in causes No. B-35379; B-35380; B-35392; B-35393 and B-39394.

I further certify that the cost of filing the notices of appeal, \$5.00 each has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 28th day of July, 1958.

[Seal] R. DE MOTT
Clerk,

/s/ By THORA LUND,
Deputy.

[Endorsed]: No. 16119. United States Court of Appeals for the Ninth Circuit. Union Oil Company of California, a corporation and D. W. Clark, Appellants, vs. Murray D. Agate, Trustee in Bankruptcy of the Estates of Alton C. Simmons, Cecelia Mae Simmons, Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons, individually and as co-partners dba Alpine Lodge, bankrupts, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Oregon.

Filed and Docketed: July 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16119

D. W. CLARK and UNION OIL COMPANY OF
CALIFORNIA, a corporation, Appellants,

vs.

MURRAY D. AGATE, TRUSTEE in Bankruptcy
of the Estates of ALTON C. SIMMONS, CE-
CELIA MAE SIMMONS and LAWRENCE
W. SIMMONS, individually and as co-part-
ners, dba ALPINE LODGE, Respondent.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellants D. W. Clark and Union Oil Company of California, a corporation, hereby adopt in full as their Statement of Points on Appeal herein the Statement of Points on Appeal previously filed by Appellant-Defendant Union Oil Company of California with the Clerk of the United States District Court for the District of Oregon on the 23rd day of May, 1958, and

Appellants D. W. Clark and Union Oil Company of California, a corporation, hereby adopt as their Designation of Record on Appeal herein that certain Appellants' Amended Designation of Record previously filed by these appellants herein.

Done and Dated this 31st day of July, 1958.

WILLIAMS & ALLEY,

/s/ WAYNE S. ALLEY,

Of Attorneys for Appellants, Union Oil Company
of California, a corporation, and D. W. Clark.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 1, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ORDER

Appellee having moved the court for an order
based upon the stipulation of the parties hereto-
fore filed herein, and the court being fully advised,

It Is Hereby Ordered that the exhibits herein and
other matters designated by appellee may be omitted
from the printed record, but shall be considered by
the court as though set out in the original form in
the printed record.

Done this 11th day of August, 1958.

/s/ ALBERT LEE STEPHENS

Chief Judge, U. S. Court of Ap-
peals for the Ninth Circuit.

Certificate of Service by Mail Attached.

[Endorsed]: Filed August 11, 1958. Paul P.
O'Brien, Clerk.

